85-1527 (1)

Supreme Court, U.S.
FILED
MAR 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court of the United States

October Term, 1985

In the Matter of:

Keith L. Johnson

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF NORTH DAKOTA

DANIEL J. CHAPMAN
CHAPMAN & CHAPMAN
410 East Thayer Avenue
P.O. Box 1258
Bismarck, North Dakota 58502
Attorneys for Petitioner

25pp

QUESTION PRESENTED

1. Whether a court of one of the States of the United States can ignore the assertion of the defendant in a criminal case that a statute is so vague as to be in violation of the Fourteenth Amendment of the United States Constitution by holding that such defendant has "no standing" to challenge such statute "because his conduct was clearly proscribed by the statute."

2. Whether it is a denial of due process of law for a Trial Court of one of the states of the United States to fail to include an essential element of a criminal offense in the instructions to the jury, to-wit: That, in a prosecution for gross sexual imposition, where the State is asserting that the defendant inserted his finger into the child's vulva, one of the essential elements of the offense is that the object cannot be "the person of the actor."

3. Whether it is a denial of due process of law for a Trial Court of one of the States of the United States to refuse to grant a continuance in a criminal case where the Trial Court initially refused to allow an alibi witness to testify because of an alleged lack of notice of alibi and then reversed itself but by that time the witness had left the town where the trial was occurring and could not get back by reason of a snow storm that had arisen.

TABLE OF CONTENTS

QUESTION PRESENTED I
TABLE OF AUTHORITIES III
OPINON BELOW 1
JURISDICTION 2
STATUTES AND RULE INVOLVED 2
STATEMENT 2
REASONS FOR GRANTING THE PETITION 5
1. North Dakota statute unconstitutionally vague 6
2. North Dakota acted unconstitutionally in failing to afford to the Petitioner a fair trial in denial of due process 10
3. Denial of due process to deny continuance 12
CONCLUSION 14
APPENDIX A A1
APPENDIX B A6

TABLE OF AUTHORITIES

Cases

Baimonte v. State of Texas, 101 Tex. Crim. Rep. 622, 276 S.W. 921, 41 A.L.R. 1527 (1925) 14

Cole v. Arkansas, 333 U.S. 196, 92 L.Ed. 644, 68 S.Ct. 514) 12

Lisenba v. California, 314 U.S. 219, 86 L. Ed. 166, 62 S.Ct. 280, reh. denied 315 U.S. 826, 86 L. Ed. 1222, 62 S.Ct. 620) 13

Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) 6,7,8

State v. Allery, 322 N.W.2d 228 (N.D. 1982) 11

State v. Tibor, 373 N.W.2d 877 (N.D. 1985) 6,7,8

Thornhill v. Alabama, 310 U.S. 88, 84 L.Ed. 1093, 60 S.Ct. 736 12

Village of Hoffman Estates v. Flipside, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) 8

Constitution

United States Constitution

Amendment XIV 2,6

Statutes

28 U.S.C. Sec. 1257(3) 2

N.D.C.C. Sec. 12.1-20-02(2) 3

N.D.C.C. Sec. 12.1-20-02(3) 2,9

N.D.C.C. Sec. 12.1-20-02(4) 3

N.D.C.C. Sec. 12.1-20-03(1)(d) 2

N.D.C.C. Sec. 12.1-20-03(2)(a) 6

Rules

Vol. 21 Am.Jur.2d p. 58, CRIMINAL LAW, Sec. 649 13

No.

In the Supreme Court of the United States

October Term, 1985

In the Matter of:

Keith L. Johnson

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF NORTH DAKOTA

The undersigned attorney, on behalf of Petitioner Keith L. Johnson, petitions for Writ of Certiorari for review of the judgment of the Supreme Court of the State of North Dakota in this case.

OPINION BELOW

The opinion of the Supreme Court of the State of North Dakota is reported at 379 N.W.2d 291 (North Dakota 1986). It is also copied and attached hereto as Exhibit A.

The criminal trial was held in Burleigh County, North Dakota, state court and resulted in a verdict of guilty to a charge of gross sexual imposition, a Class A felony, punishable in North Dakota by imprisonment for up to 20 years, a $10,000.00 fine or both such fine and imprisonment.

JURISDICTION

The decision of the North Dakota Supreme Court was filed on January 7, 1986, and became final with the denial of a Petition for Rehearing on January 30, 1986. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257(3).

STATUTES AND RULE INVOLVED

1. U.S. Constitution, Amendment XIV, provides, in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Petitioner Keith L. Johnson is a citizen of the United States and of the State of North Dakota. As such he is entitled to protection under the Constitution of the United States.

On May 20, 1984, he was charged in Burleigh County, North Dakota, Court with the crime of gross sexual imposition, involving the seven-year-old daughter of his girlfriend with whom he had often been intimate. In North Dakota, gross sexual imposition is a Class A felony.

North Dakota law at the time of the alleged offense provided under Sec. 12.1-20-03(1)(d), North Dakota Century Code, that a "person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of an offense if...(t)he victim is less than fifteen years old..."

The term "sexual act" was defined in Sec. 12.1-20-02(3), N.D.C.C., as:

> "...sexual contact between human beings consisting of contact between the penis and the vulva, the penis and the anus,

> the mouth and the penis, or the mouth and the vulva; or the use of an object which comes in contact with the victim's anus, vulva, or penis. For the purposes of this subsection, sexual contact between the penis and the vulva, or between the penis and the anus or an object and the anus, vulva or penis of the victim, occurs upon penetration, however slight. Emission is not required."

The word "object" was defined in Sec. 12.1-20-02(2), N.D.C.C., as "anything used in commission of a sexual act other than the person of the actor."

The definition of "sexual contact" in North Dakota has undergone important revisions in the past several years. It is Sec. 12.1-20-02(4), N.D.C.C. Prior to the time of the alleged act and up until 1983, sexual contact was defined as "any touching of the sexual or intimate parts of the person for the purpose of arousing or gratifying sexual desire." (emphasis added to show change to follow)

In 1983, this was changed and, thus, at the time of the alleged offense, it was defined as "any touching of the sexual or intimate parts of the person." Note the omission of the underlined language from the statute as it existed prior to 1983.

In 1985, after the alleged offense, the definition was again revised to "any touching of the sexual or other intimate parts of the person for the purpose of arousing or satisfying sexual or aggressive desires." (emphasis added to show new language)

The child in this case asserted that the Petitioner had lifted her by the waist off the ground while she was returning from using the bathroom in his home and that while she was so suspended and her panties and pants were down, he (1) licked her cat (referring to her private parts) and (2) stuck his finger up her cat.

The case was tried to a jury in Burleigh County District Court. In the opening remarks of the Assistant's State's Attorney (prosecuting attorneys in North Dakota are known as State's Attorneys),

she told the jury:

> "He pulled down her pants and her panties and performed a sexual act on her by the use of his mouth and his finger. She will tell you that it hurt." (Underlining for purpose showing intent of State to proceed on both use of finger and the mouth as will become important in subsequent portions of this Petition)

In the course of the trial two important things occurred:

1. After the mother of the victim testified that she awakened from a nap at "about 6:30 or a quarter to seven", before which all of the alleged acts had occurred, the defense offered to produce two witnesses for the purpose of showing that the defendent was elsewhere until about 7:00 o'clock. This testimony from the mother of the victim was a total surprise. Yet, upon motion of the State these witnesses were excluded on the ground that notice of alibi had not been given as required by the rules. Subsequently, however, the Trial Judge reversed itself and offered to allow the witnesses to testify. One of the witnesses, however had left town and had gone to an adjacent town (about 22 miles away from Bismarck) where she lived and she asserted that she could not return because a snow storm had come up which prevented her return. The Trial Judge refused to grant a continuance and the trial proceeded without the testimony of that witness, Petitioner's Aunt, who was the one who was best in the position to determine when the Petitioner actually left the graduation party which he was then attending because she saw him when he was leaving. The other witness, Petitioner's sister, is an invalid as the result of an automobile accident and she could only surmise as to when the Petitioner left her home, based upon her observations from her wheel chair.

2. At the conclusion of the testimony, the Trial Judge submitted to trial counsel proposed instructions to be given to the jury. This, under North Dakota practice, is for the purpose of allowing counsel to make objections. In general,

failure to object to instructions at that point constitutes a waiver of the right to object later, except to the extent that the alleged error constitutes an obvious error which affects substantial rights of the parties. The error in the instructions that was not noted by the Petitioner's counsel was the failure to instruct the jury that the word "object" as used in the statute must be "other than the person of the actor." In that respect, then, we have submitted that the finger of the alleged actor would be part of his "person" and would not, therefore, come within the definition of an object, making it impossible for the jury to have arrived at a verdict of guilty based upon his use of the finger in the vulva, which was, as indicated by the opening statement of the Assistant State's Attorney, one of the intended goals of the State.

Subsequent to the verdict of guilty arrived at by the jury in this case, a motion in arrest of judgment was made, citing as one of the grounds the unconstitutionality of the statute, and this motion was denied. Appeal was taken to the North Dakota Supreme Court, setting forth all of the foregoing as grounds for reversal of the conviction, and the North Dakota Supreme Court issued its opinion on January 7, 1986, affirming the judgment of the District Court. A Petition for Rehearing was submitted and was also denied.

Unless the United States Supreme Court grants certiorari in this matter the Petitioner will be required to turn himself over to the Warden of the State Penitentiary to begin serving a six-year sentence, of which the last two are to be suspended.

REASONS FOR GRANTING THE PETITION

We respectfully submit that this Petition should be granted for the following reasons:

1. Petitioner is about to be jailed in violation of his constitutional rights, specifically his right to a fair trial under a statute that gives reasonable notice of the nature of the offense for which he is being charged; and

2. North Dakota courts have embarked upon a course of judicial interpretation of federal decisions, including those of the United States Supreme Court, which is contrary to the intended purpose of those decisions and to the Fourteenth Amendment of the United States Constitution, which, if unimpeded, will result in an unending series of miscarriages of justice in the State of North Dakota.

Each of the alleged infringements upon the Due Process clause of the Fourteenth Amendment will be discussed in separate portions of this Petition.

1. North Dakota statute unconstitutionally vague.

It is Petitioner's position that the North Dakota statute is void for vagueness but he can't get anyone to decide whether it is or not. This is so because North Dakota Supreme Court, in a previous decision, *State v. Tibor*, 373 N.W.2d 877 (N.D. 1985), held that a person challenging a statute did not have "standing" to make such challenge because he "has not demonstrated that Sec. 12.1-20-03(2)(a) is impermissibly vague as applied to him..." (emphasis added)

Cited to support this position is *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). We believe that we will be able to show in subsequent portions of this brief that that case has no application in a case of this kind.

The problem originated in *State v. Tibor*, supra, when the Trial Judge, who had held the 1983 statute defining "sexual contact" to be unconstitutional, cited some specific examples of instances when the statute would be obviously inapplicable, such as when a doctor or a babysitter changed a boy's diapers or treated some rash on the baby's private parts or when a parent or brother was "kissing or hugging or roughhousing" with a child.

Taking this as an attempt on the part of the defendant in that case to rely on the fact that the statute may be unconstitutionally vague as to doctors and babysitters and parents and that, therefore, although it was not vague as to him, he could seek the same pro-

tection, the Court misread the intention of the Trial Court and the defendant and failed to understand that such a list was merely illustrative of the kinds of situations that might arise when the point was clear. This did not detract from the fact that the challenge was to that statute in the circumstances of defendant's case in *Tibor.*

The statute as it then existed (and existed at the time of Petitioner's alleged offense) did not contain the words "for the purpose of arousing or gratifying sexual desire" as it did before and after. The point is that whether it is a doctor or a babysitter or a friend, the statute is vague because it does not show the prohibited purpose or conduct.

A statute may not be constitutional as to one person and unconstitutional as to another person, both making the same challenge to the statute and neither being specifically included or exempted under the statute's terms.

The North Dakota Court, in *State v. Tibor,* supra, attempts to apply *Parker v. Levy,* supra, in a manner that was never contemplated. After all, the rationale, even for the majority opinion in *Parker,* is merely that the conduct of Captian Levy was expressly covered by the Military Articles under which the proceedings were brought. The majority ruled, as did the Court of Appeals, that Captain Levy's conduct was covered under an express example contained in the Manual for Courts-Martial. It prohibited utterances of military personnel "praising the enemy, attacking the war aims of the United States, or denouncing our form of government."

Parker v. Levy does not hold that one can, as the North Dakota Court would appear to suggest, shore up a vague statute by pointing out that the defendant could use a Bill of Particulars to get a detailed notice of the facts giving rise to his prosecution. (See Note 5 at bottom of page 881 of the Northwestern Reporter.)

All of this, however, in *State v. Tibor,* supra, is predicated on a "standing" issue. The Court says, at page 881:

"Consequently, because Tibor has not demonstrated that Sec. 21.1-20-03(2)(a) is impermissibly vague as applied to him,

he has no standing to raise such a constitutional claim." (Citing Parker and another North Dakota case)

To compound the error, the North Dakota Court also attempts to rely upon *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 102 S.Ct. 1186, 71 L. Ed.2d 362 (1982) and uses language from that case that the statute (ordinance in *Flipside*) must be impermissibly vague "in all of its applications." That language was used in *Flipside* only because the whole purpose of the challenge in that case was an attempted prior restraint upon the application of the ordinance. Naturally, then, the ordinance would have to be impermissibly vague in all of its applications because if it were not vague in any respect, it would have validity.

Such language has no application to a case in which a defendant challenges a statute as being vague in its application to him, as was the case in *State v. Tibor*, supra, and as was the case in the instant matter. *Parker v. Levy*, supra, involved a case in which the Military Article was held to have application in an exact case as the one before the Military Tribunal. *Village of Hoffman Estates v. Flipside*, supra, was a prior restraint upon the utilization of an ordinance. Neither case is in any way similar to the one which was before the North Dakota Court.

Thus, because the North Dakota Court concluded, on the basis of those decisions, that the defendant did not have standing to challenge the statute, the Court did not look to the question of the constitutionality of a statute which holds it to be a Class A felony merely to touch the sexual or other intimate parts of a person without regard to purpose.

The North Dakota Court states, at page 293 of the opinion in the instant case, that Petitioner Johnson "cannot challenge the statute" because his conduct was "clearly proscribed to the statute." It is not clear how one can determine if conduct is clearly proscribed until the statute is examined as to its constitutionality.

We submit that any person at any time may challenge a statute as being unconstitutional. Whether or not the statute is held to be violative of the constitution is an entirely different question.

The final point that must be made in connection with this assertion is that one might argue that the statute (Sec. 12.1-20-02(3)) clearly prohibits the use of the mouth on the vulva. That, of course, begs the question because it will be noted that "sexual contact" is described as involving penetration in every other case covered by the statute. Thus, the mere touching of the penis to the vulva is not enough to constitute the sexual act. Nothing is said, however, as to what constitutes "sexual contact" involving the mouth. This, in and of itself, is vague. But if the statute is in some way to be preserved, the only way in which this could be done would be by reference to the definition of "sexual contact" found in the next subsection, which brings us right back to the fact that for a period of about two years, the words "for the purpose of arousing or satisfying sexual or aggressive desires" (or its equivalent) were gone from the statute.

It may be, of course, that the North Dakota Court, prompted to do so, might conclude that the statute, as applied to the use of the mouth on the vulva, is not vague and unconstitutional. That has not occurred, as yet, because the matter merely turned on a "standing" issue.

We would be content if certiorari were granted and the matter was returned to the North Dakota Court with instructions to give consideration to the question raised as to the validity because of its vagueness. As we see it, the only issue that we seek to have determined is the "standing" question. Before this Court rules on the actual constitutionality of the statute, we submit that the North Dakota Court should first render its opinion on the subject.

If, however, the matter of constitutionality were to be reached, we would be prepared to do so. In this regard we submit that no matter how heinous the act may be, those who may come in conflict with the legislation must know what is being prohibited.

The North Dakota Court states, at page 293, that this Petitioner cannot even challenge the statute because his conduct was clearly proscribed by the statute.

The situation in North Dakota seems, we assert, to lend itself

precisely to utilization of the office of certiorari to ensure that the states of the United States are following the constitution of the United States. We think it is amply clear that it is not being followed, in this respect, in North Dakota.

2. North Dakota Court acted unconstitutionally in failing to afford to the Petitioner a fair trial in denial of due process.

It is axiomatic that the due process clause of the Fourteenth Amendment requires that, in a criminal case where the liberty of the defendant is at stake, he have a fair trial.

That did not occur in this case for two reasons, the first of which will be discussed in this section.

The statute under which the Petitioner was being prosecuted provided that the act of gross sexual imposition could be accomplished in a number of ways. One of these was by the use of an object with the vulva. The statute further required that there be penetration by that object in order to complete the crime.

Essential, then, to the proof of the crime through the use of an object is the definition of an "object" which is said to be anything but the "person" of the actor. Clearly, the finger is part of the person of the actor, because the actor can only act through the use of one of his or her parts -- in this case, the finger.

Yet, the jury was never told this. The definition was not given to the jury and it may be presumed that the use of an object was a significant part of the deliberations of the jury, particularly because that was part of the argument of the state. The Assistant State's Attorney, in her opening remarks to the jury said:

> "He pulled down her pants and her panties and performed a sexual act on her by the use of his mouth and his finger. She will tell you that it hurt." (excerpt from transcript of trial at page 10, attached here as Exhibit B)

How, then, could the sexual act have been committed by the use of the Petitioner's finger when that is not part of the definition of sexual act, unless it comes within the definition of "object"?

To get around this obvious error, the Supreme Court held,

in effect, that the failure of Trial Counsel to note the omission was fatal to the right of the defendant to object at the appellate court level.

Before proceeding further, we must deal with the argument that since there was ample evidence upon which the jury could have reached a verdict of guilty, apart from the erroneous phase of the trial, the verdict will be sustained.

In this case there was a virtual physical impossibility that the act of placing the defendant's mouth on her vulva could have been accomplished. She testified that he lifted her off the ground by the waist and that she still had her pants and panties on, down around her knees, and that he was on his knees when he did this.

Keeping in mind the constriction caused by the pants and panties of the child being at the knees and further keeping in mind that in order for there to have been a violation the defendant's tongue would have actually have come in contact with the "vulva", the jury might have had some difficulty in finding that that occurred beyond a reasonable doubt. It would have been less difficult to have found the other violation because there was testimony by a doctor that there was reddening in the vaginal area, which clearly did not come from the use of the tongue.

Since, then, the use of the finger was a major part of the state's case and since the law does not seem to include that within the definition of sexual act if one considers the definition of "object" as used in the statute, the failure on the part of the Court, with or without the urging of the defendant's counsel, to give to the jury the definition of the word "object" which is set forth in the very statute under which the defendant was prosecuted was plain and obvious error and it affected the substantial rights of the defendant.

The North Dakota Court recognizes the general rule that the failure on the part of the Trial Court to give an instruction can be "obvious error" for which there must be a new trial, even though the action was not objected to at the time of the trial. *State v. Allery*, 322 N.W.2d 228 (N.D. 1982) In the instant case, however, the North

Dakota Court concluded that this was not obvious error.

It is this ruling that we submit is a denial of due process. The failure of the Court to instruct on the meaning of the word "object", was so patently error as to render any verdict reached thereon to be faulted. What this could mean is that, by reason of the "obvious error" committed by the Trial Court, this defendant could well have been convicted upon the State's assertion that an object was used in penetrating the vulva of the victim which could not have been an "object" as defined by the statute.

The United States Supreme Court has held, for example, that it is a denial of due process to convict a man upon a charge that was not made (*Thornhill v. Alabama*, 310 U.S. 88, 84 L.Ed. 1093, 60 S.Ct. 736) or on which he was not tried. (*Cole v. Arkansas*, 333 U.S. 196, 92 L.Ed 644, 68 S.Ct. 514) It is but a short step from that to what we urge here which is that it is a denial of due process to convict a man upon evidence which does not even come under the statute because of the failure of the Trial Court to exclude that possibility through an appropriate instruction, which was not given.

As noted, then, this conviction, in all likelihood, is based upon the misapprehension of the jury that it could convict the defendant of gross sexual imposition on the basis of the use of an object with the vulva when the only possible "object" could be the actor's finger, which would be contrary to the definition of "object" contained in the statute.

3. Denial of due process to deny continuance.

The Trial Court caused another violation of due process in this matter, resulting in the denial of a fair trial to the defendant.

This came about when one of the prosecution witnesses, the victim's mother, testified that she awakened from a nap at about 6:30 to 6:45, before which all of the events surrounding this matter had occurred. This prompted the production by the defense of two witnesses who could put the defendant at a graduation party at his sister's house after 7:00 o'clock.

The State immediately objected that notice of alibi had not

been given, to which the defense responded by noting that it had been surprised by the testimony of the victim's mother and had not known of it before trial so that the notice of alibi could be given.

The Trial Court first sustained the prosecution's objection, at which time an offer of proof was made and the witnesses were released. Then the Trial Court reversed itself and only one of the witnesses could be retrieved. That witness was Petitioner's sister, an invalid confined to a wheel chair, who testified that, from her vantage point, she had the "impression" that he left her house at about 7:00 p.m.

The missing witness was Petitioner's aunt and her testimony, according to her offer of proof, was the she saw the Petitioner at about 7:00 p.m. It was not, therefore, cumulative, as argued by the state, (even though we do not concede that this is an excuse to deny the right to produce a witness) but, to the contrary, her testimony would have been more forceful.

We submit that this denied to the Petitioner a fair trial, which, of course, is a denial of due process. It has been said that the failure to grant a continuance sought during the course of a trial to enable the defendant to rebut surprise prosecution testimony may in some circumstances amount to the denial of a fair trial. (See Vol. 21 Am.Jur.2d p. 58, CRIMINAL LAW, Sec. 649, citing *Lisenba v. California,* 314 U.S. 219, 86 L. Ed. 166, 62 S.Ct. 280, reh. denied 315 U.S. 826, 86 L. Ed. 1222, 62 S.Ct. 620)

Such a holding is not precisely in point but it is close. The refusal to grant a continuance was crucial in that it prevented the Petitioner from presenting a valid alibi defense. It is not as if the Petitioner caused the problem; the problem was that of the Trial Court in reversing itself after the witnesses had been released.

While, of course, no one can be sure what the result might have been had the witness testified, still the question is merely one of a "fair trial" and one cannot have a "fair trial" without having the opportunity to present all evidence which he is entitled to present.

The North Dakota Court dismissed this contention by stating

that the evidence would have been "purely cumulative". We submit that that is no answer as will be seen by the case of *Baimonte v. State of Texas,* 101 Tex. Crim. Rep. 622, 276 S.W. 921, 41 A.L.R. 1527 (1925), in which the following is said:

> "It has been often held by this court that the fact that the evidence is cumulative where it is sought to establish an alibi is no reason for its exclusion, but, on the contrary, the greater the number of witnesses to the facts establishing it, the stronger ordinarily would be the reliance upon and conviction of its truth."

It will be noted that the North Dakota Court cites no authority for its conclusion that if testimony is "purely cumulative", there is no problem in depriving the defendant of the benefit of such testimony. In logic, it would appear obvious that a fact is more likely to be true if two persons swear to it than one.

The State in this case, then, prevented the defendant from having a fair trial by the Court's refusal to grant a continuance so that the defendant could call the witness whose absence was the direct responsibility of the Court. It is for this reason that we submit that this matter arises to the level of due process.

The fact, then, that Petitioner failed to receive a fair trial because of the refusal of the Trial Court to permit him to have his witnesses present is a denial of due process.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Dated this 3rd day of March, 1986.

Respectfully submitted,

DANIEL J. CHAPMAN, *Counsel of Record*
CHAPMAN & CHAPMAN
410 East Thayer Avenue
P.O. Box 1258
Bismarck, North Dakota 58502
Attorneys for Petitioner

APPENDIX

APPENDIX A

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota — Plaintiff and Appellee

v.

Keith L. Johnson, — Defendant and Appellant

Criminal No. 1084

Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable Larry M. Hatch, Judge.

AFFIRMED.

Opinion of the Court by Meschke, Justice.

Patricia L. Burke, Assistant States Attorney, 514 East Thayer Avenue, Bismarck, ND 58501, for plaintiff and appellee.

Chapman & Chapman, P.O. Box 1258, Bismarck, ND 58502, for defendant and appellant; argued by Daniel J. Chapman.

State V. Johnson

Criminal No. 1084

MESCHKE, Justice.

Keith L. Johnson appeals from a criminal judgment entered upon a jury verdict finding him guilty of gross sexual imposition. We affirm.

Melissa, the complaining witness, was seven years old at the time the alleged incident occurred. Melissa's mother was Johnson's girlfriend, and the three of them were at Johnson's cabin. Melissa testified that while her mother was asleep, Johnson pulled down her jeans and panties and licked her "cat," the term she used to

describe her vaginal area. She also testified that Johnson "stuck his finger up my cat." According to Melissa, the incident lasted approximately ten minutes. The physician who examined Melissa testified that he found a reddened area near the vagina and that this type of trauma was consistent with Melissa's testimony. Johnson testified at trial and denied the allegations.

Johnson was charged with gross sexual imposition under § 12.1-20-03 (1) (d), N.D.C.C., which provides that "[a] person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of an offense if ... [t]he victim is less than fifteen years old ..." The term "sexual act" is defined in § 12.1-20-02(3), N.D.C.C., as:

> "... sexual contact between human beings consisting of contact between the penis and the vulva, the penis and the anus, the mouth and the penis, or the mouth and the vulva; or the use of an object which comes in contact with the victim's anus, vulva, or penis. For the purposes of this subsection, sexual contact between the penis and the vulva, or between the penis and the anus or an object and the anus, vulva, or penis of the victim, occurs upon penetration, however slight. Emission is not required."

"Object" is defined in § 12.1-20-02(2), N.D.C.C., as "anything used in commission of a sexual act other than the person of the actor."

Johnson first asserts that because sexual contact between the finger of the actor and the vulva is not proscribed under the portion of the statute charged, and because the remaining evidence established only sexual contact between the tongue and the vulva, the evidence is insufficient to sustain the verdict because the tongue is not part of the mouth. We disagree.

Words used in a statute are to be understood in their ordinary sense. Section 1-02-02, N.D.C.C. The "mouth" has been defined as "[t]he system of related organs including the lips, teeth, tongue, and associated parts, with which food is chewed and swallowed and sounds and speech are articulated." The American Heritage

Dictonary 818 (2nd College Ed. 1985). We conclude that the tongue is part of the mouth for purposes of § 12.1-20-02(3), N.D.C.C. *Cf. People v. Hickok*, 96 Cal.App.2d 621, 216 P.2d 140, 145 (1950) [lips are part of the mouth for purposes of statute proscribing "act of copulating the mouth of one person with the sexual organ of another"].

Johnson next asserts that the trial court erred in failing to instruct the jury on the meaning of the word "object". The trial court's instruction on the definition of "sexual act" tracks the statutory language of § 12.1-20-02(3), N.D.C.C. Johnson contends that the finger cannot be an "object" under § 12.1-20-02(2), N.D.C.C., and that the trial court's failure to so instruct the jury may have resulted the jury improperly basing the conviction on evidence of the use of the finger. Defense counsel concedes, however, that he did not object at trial to the instructions that were given, nor did he request an instruction defining the term "object."

Under Rule 30(c), N.D.R.Crim. P., an attorney's failure to object at trial to instructions which he had the opportunity to object to before they were given to the jury operates as a waiver of his right on appeal to complain of instructions that either were or were not given. *State v. Gates*, 325 N.W.2d 166, 167 (N.D. 1982). When the issue has not been properly preserved for review, as in this case, our inquiry is limited to determining whether the alleged error constitutes an obvious error which affects substantial rights of the defendant. Rule 52(b), N.D.R.Crim.P.; *State v. Demery*, 331 N.W.2d 7, 11 (N.D. 1983).

The power to notice obvious error is one we exercise cautiously and only in exceptional circumstances. *State v. Bartkowski*, 290 N.W.2d 218, 221 (N.D. 1980). It should be exercised only where a serious injustice has been done to the defendant. *State v. Brickzin*, 319 N.W.2d 150, 152 (N.D. 1982). In assessing the possibility of error concerning substantial rights under Rule 52(b), we examine the entire record and the probable effect of the actions alleged to be error in light of all the evidence. *State v. Rindy*, 299 N.W.2d 783, 785-786 (N.D. 1980).

The nature and probable effect of the alleged error in this case differs from that present in *State v. Trieb*, 315 N.W.2d 649 (N.D. 1982), which involved a constitutionally defective instruction on intent, and *State v. Allery*, 322 N.W.2d 228, 233 (N.D. 1982), which involved the lack of a cautionary instruction limiting the use of a witness's damaging prior inconsistent statement where the remaining evidence was "largely circumstantial and, in one respect may have approached improper comment" on the defendant's right to remain silent. Although an instruction defining the term "object" would have been appropriate under the circumstances of this case, we believe that the alleged error is not of constitutional magnitude. The record contains ample evidence to establish sexual contact between the mouth and the vulve, which satisfies the statutory definition of "sexual act." We conclude that the trial court's failure to sua sponte instruct the jury on the definition of "object" did not constitute obvious error affecting substantial rights.

Johnson asserts that the statute under which he was charged, § 12.1-20-03(1)(d), N.D.C.C., as clarified by the definitions found in § 12.1-20-02(3), N.D.C.C., is unconstitutionally vague and overbroad.

Contrary to Johnson's underlying arguments concerning this issue, we believe that the word "mouth" is commonly understood to include the tongue and that a reasonable person would know that licking the vulva of a child constitutes a sexual act as defined in § 12.1-20-02(3), N.D.C.C. The doctrine of overbreadth prohibits the law from criminalizing constitutionally protected activity. *State v. Tibor*, 373 N.W.2d 877, 880 (N.D. 1985). Johnson's conduct of engaging in a sexual act with a child is not constitutionally protected activity.

With regard to the assertion that § 12.1-20-02(3), N.D.C.C., is unconstitutionally vague, Johnson cannot challenge the statute. Because his conduct was clearly proscribed by the statute, he cannot complain of its possible application to the conduct of others. See *State v. Morris*, 331 N.W.2d 48, 58 (N.D. 1983).

Johnson asserts that he was denied a fair trial when the court

initially refused to allow a defense witness to testify, and after reversing its ruling, refused to grant Johnson's motion for a continuance so that the witness could return to testify.

Johnson testified that he did not arrive at the cabin until after 7 p.m. and that he and Melissa watched television together while Melissa's mother was asleep. Melissa's mother testified, however, that Melissa awakened her at the cabin between 6:30 and 6:45 p.m., after the alleged offense occurred. Johnson attempted to call his sister and aunt as witnesses to verify that he had been at his sister's home until approximately 7 p.m. that evening. The trial court refused to allow the testimony because of lack of proper notice of alibi under Rule 12.1, N.D.R.Crim.P., and Johnson made an offer of proof. After the court reversed its ruling, Johnson's sister testified to the effect that Johnson did not leave her home until approximately 7 p.m., but Johnson's aunt, who had returned to her home in Wilton, was unable to return to Bismarck to testify. The trial court denied Johnson's request for a continuance on the basis that his aunt's testimony would be "purely cumulative."

Generally a trial court's failure to grant a motion for continuance will not be overturned on appeal unless the court abused its discretion. *Matter of Bo,* 365 N.W.2d 847, 852 (N.D. 1985). An abuse of discretion has been defined as an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. *State v. Knoefler,* 325 N.W.2d 192, 195 (N.D. 1982). We find no abuse of the trial court's discretion under the circumstances.

A defendant in a criminal action is entitled to a fair trial, not a perfect trial. *State v. Carr,* 346 N.W.2d 723, 726 (N.D. 1984). Having carefully reviewed the record in this case, we conclude that Johnson received a fair trial.

The judgment is affirmed.

Herbert L. Meschke
Beryl J. Levine
Gerald W. VandeWalle
Ralph J. Erickstad, C.J.

for quite a while and he was watching T.V. too. He sat at the other end of the couch at the head of Shirley Olheiser.

Melissa will tell you that after a while she had to go to the bathroom. She was a little girl and she had been drinking pop. She got up from the couch and went through the bedroom of the cabin to get to the bathroom. When she came out of the bathroom, and as she was coming back through the bedroom to get back to the couch where her mother was laying down sleeping, the defendant stopped her. He pulled down her pants and her panties and performed a sexual act on her by the use of his mouth and his finger. She will tell you that it hurt.

Melissa will also tell you what happened after that. The defendant left the cabin at that point in time, that she woke her mommy up and said, "I want to go home." Her mother woke up and looked around and saw only Keith Johnson left from the party and asked him to give her a ride home. Shirley Olheiser had no idea at that time, according to what Melissa will tell you and what Shirley will tell you, what had happened. So they did come back to Bismarck in Keith Johnson's truck.

Melissa will tell you about a picture that she found at home after they got there of the defendant, and how because she was so mad at him for what he had done, she tore it and her mother got mad at her. The next morning she